INDEX

	Page
Opinions below	2
Jurisdiction	2
Questions presented	2
Treaties and statute involved	3
Statement	4
Reasons for granting the writ	8
Conclusion	13
Appendix A	1a
Appendix B	9a

CITATIONS

CASES:

Cordero v. *United States*, 111 F. Supp. 556	9
Farmers Loan & Trust Co. v. *Hicks*, 9 F. 2d 848	9
Garvan v. *Commercial Trust Co. of New Jersey*, 275 Fed. 841	8
Geofroy v. *Riggs*, 133 U.S. 258	12
In re Ross, 140 U.S. 453	12
Isenberg v. *Trent Trust Company*, 26 F. 2d 609; 31 F. 2d 553	5
Klein v. *Palmer*, 18 F. 2d 932	11
Manufacturers Trust Company v. *Kennedy*, 291 F. 2d 460	9
Munich Reinsurance Co. v. *First Reinsurance Co.*, 6 F. 2d 742	11
Rocca v. *Thompson*, 223 U.S. 317	12
Santovincenzo v. *Egan*, 284 U.S. 30	12
United States v. *Chemical Foundation*, 272 U.S. 1	12
United States v. *D'Auterive*, 10 How. 609	12
Ware v. *Hylton*, 3 Dall. 199	12

TREATIES AND STATUTES: Page

Joint Peace Resolution of July 2, 1929, S. J. Res. 16, c. 40, 42 Stat. 105 ..... 3, 5, 11, 14a

Trading with the Enemy Act, October 6, 1917, c. 106, 40 Stat. 411, 50 U.S.C. App. § 34 ..... 3, 4, 8, 9a

Treaty of Berlin, proclaimed November 14, 1921, 42 Stat. 1939 ..... 3, 5, 11, 15a

Treaty of Versailles (T.S. No. 658, Sen. Doc. 348, 67th Cong., 4th Sess.) Part X, section IV:

Art. 297 ..... 3, 7
Paragraph (d) 5, 11a
Paragraph (i) 11a

Annex to Section IV 5, 12a
Paragraph 1 ..... 5, 12a
Paragraph 2 ..... 5, 9, 13a
Paragraph 3 ..... 13a

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No.

TRENT TRUST COMPANY, LTD.,

and

COOKE TRUST COMPANY, LTD., *Petitioners*

v.

ROBERT F. KENNEDY, Attorney General of the United States, as Successor to the Alien Property Custodian

---

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioners pray that writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above cause on January 4, 1962, affirming the judgment of the United States District Court for the District of Columbia.

OPINIONS BELOW

The United States District Court for the District of Columbia filed no opinion and made no findings of fact or conclusions of law. The opinion of the Court of Appeals for the District of Columbia Circuit as initially filed January 4, 1962 (App. A, pp. 1a-6a) is not officially reported; its opinion, as amended by order filed September 14, 1962 (R. 34-38; App. A, p. 8a) is reported in 307 F. 2d 174.

JURISDICTION

The judgment of the Court of Appeals sought to be reviewed was entered on January 4, 1962 (R. 40; App. A, p. 7a). Pursuant to order entered February 21, 1962 permitting its filing out of time (R. 40a), petition for rehearing was filed the same day (R. 41). On September 14, 1962, the Court entered its order amending its opinion (R. 53; App. A, p. 8a) and the same day entered its order denying the petition for rehearing (R. 52). The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1254(1).

QUESTION PRESENTED

In Hawaii in 1922, German nationals claimed and in 1928 (by judgment of the Ninth Circuit reversing the Hawaii Supreme Court) recovered damages from petitioner, as trustee, for its breach of trust, in failing to sue to recover back from the Alien Property Custodian trust assets held under the trust for the benefit of enemy German nationals and seized by the Custodian as enemy property, and in failing thus to prevent sale of the trust property by the Custodian.

Upon suit in 1959 by the American trustee, to recover from German government funds seized in World War II, on the German government's obligation arising

from the breach of the Versailles treaty annex covenant, resulting from the 1922 claim and recovery by German nationals, the question presented is:

Whether that covenant for the protection of American nationals against claim or action by German nationals "in respect of any act or omission under or in accordance with the exceptional war measures, laws or regulations" of an Allied government, is limited so as to protect only against claims or actions asserting liability of American nationals to German nationals under the Trading with the Enemy Act or other war time regulations or is to be read literally broadly to protect American nationals against any claim against them, as trustee, bailee, agent or otherwise, seeking to impose liability to German nationals on account of any act or omission that was "under or in accordance with" the war time measures of the United States with respect to enemy property.

TREATIES AND STATUTE INVOLVED

The statute and treaties involved are as follows:

Trading with the Enemy Act, sec. 34 (added by Act of August 8, 1946, c. 878, sec. 1, 60 Stat. L. 925, 927, amending the First War Powers Act, 1941, Title III, 55 Stat. 838, 50 U.S.C. App. § 34.

Treaty of Versailles, concluded June 28, 1919 (Sen. Doc. 348, 67th Cong., 4th Sess., T. S. No. 658), Part X, Section IV, Art. 297, and Annex to Section IV.

Joint Peace Resolution of July 2, 1921, S. J. Res. 16, c. 40, sec. 2, 42 Stat. 105.

Treaty of Berlin, proclaimed November 14, 1921, Arts. I and II, 42 Stat. 1939, 1942-1943.

The pertinent portions are set out in Appendix B, *infra*, pp. 9a-15a.

STATEMENT

By complaint filed December 29, 1959, under sec. 34 of the Trading with the Enemy Act,[1] petitioners[2] brought this suit in the United States District Court to review the denial by the Attorney General[3] of petitioners' debt claim against funds of the German Government seized in World War II and confiscated by the United States under section 34 of the Trading with the Enemy Act. Jurisdiction of the District Court was conferred by 50 U.S.C. App. § 34(f).

The petitioners by their amended complaint (R. 3-8) asserted that on objections to its account as trustee filed by German national beneficiaries in 1922, it had been held liable to such beneficiaries on judgment final in 1929, for breach of its fiduciary duty as trustee in failing to sue to recover back from the Alien Property

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[1] Section 34 was added by the Act of August 8, 1946, c. 878, sec. 1, 60 Stat. 925, 927 (amending the First War Power Act, 1941, Title III, 55, Stat. 838 (1941)), 50 U.S.C. App. § 34. It provided for submission of such claims to the Alien Property Custodian and authorized complaint in the United States District Court for the District of Columbia to review his schedule of claims allowed Congress created a quasi-in-rem proceeding providing that any property or interest vested in the Alien Property Custodian subsequent to December 18, 1941, or the net proceeds thereof shall be equitably applied to payment of debts owed by the person who owned such property or interest immediately prior to the vesting in the Alien Property Custodian.

[2] The Cooke Trust Company is the receiver for Trent Trust Company appointed January 9, 1932, by the Circuit Court of the First Judicial Circuit of Hawaii (R. 4).

[3] By Executive Order No. 9788 (11 Fed. Reg. 11981 (1946)) the office of the Alien Property Custodian was terminated and its powers and functions transferred to the Attorney General. "Custodian" will hereinafter refer to the Custodian or the Attorney General as his successor, as context may require.

Custodian certain sugar company stocks that had been seized and held by the Custodian and in failing thus to prevent public sale of such stocks by the Custodian. *Estate of Isenberg*, 28 Hawaii 590, reversed *Isenberg* v. *Trent Trust Co.*, 26 F. 2d 609, rehearing denied, 31 F. 2d 553 (9th Cir. 1928, 1929) (R. 8).

The amended complaint further alleged that this recovery by action by German nationals was a breach of the German Government's covenant and obligation contained in the Treaty of Versailles (Part X, Section IV, Art. 297(d), and Annex to Section IV) rights under which were reserved and granted to American nationals by the provisions of section 2 of the Joint Peace Resolution of July 2, 1921, S. J. Res. 16, c. 40, 42 Stat. 105 and by the Treaty of Berlin, 42 Stat. 1942-1943 (R. 10-11).

The Treaty of Versailles Part X, Section IV provided that as between the Allied Powers or their nationals on the one hand and Germany or her nationals on the other, all exceptional war measures or measures of transfer; or acts done in execution of such measures "shall be considered as final and binding upon all persons" (Art. 297(d), (App. B, *infra*, p. 11a). Germany undertook to compensate her own nations in respect of the sale or retention of their property, rights or interests in Allied States (Art. 297(i), (App. B, *infra*, p. 11a). Paragraph 1 of the Annex to Section IV spelled out in detail the confirmation of the effectiveness of all Allied orders dealing with property of German nationals and provided: "No question shall be raised as to the regularity of a transfer of any property rights or interests dealt with in pursuance of any such order, direction, decision or instruction." The amended complaint (R. 11) invoked paragraph 2 of the same

Annex to Section IV spelling out the broad protection afforded Allied nationals who conformed to the vesting policies and measures of the Allied Government and thus upheld the hands of the Allied powers during the war. It provided:

> "No claim or action shall be made or brought against any Allied or Associated Power or against any person acting on behalf of or under the direction of any legal authority or Department of the Government of such a Power by Germany or by any German national wherever resident in respect of any act or omission with regard to his property, rights or interests during the war or in preparation for the war. *Similarly no claim or action shall be made or brought against any person in respect of any act or omission under or in accordance with the exceptional war measures, laws or regulations of any Allied or Associated Power.*" (Emphasis supplied.)

The amended complaint alleged (R. 11) that thus "the German Government itself in effect issued a valid insurance policy to any American national that he would not be held liable by a German national for any act or omission in compliance or in accordance with exceptional war measures" (R. 11).

The complaint further alleged that the Alien Property Custodian held funds (representing money or property seized from the German Government and called "trust funds") in the amount of $2,292,813.96 which Congress had by the addition of section 34 of the Trading with Enemy Act directed to be used for payment of debts of the German Government (R. 11).

The complaint concluded with allegation that the administrative remedy under section 34 had been ex-

hausted by the Alien Property Custodian's disallowance of plaintiff's claim (R. 12).

The answer of the United States admitted most of the facts alleged but denied error in disallowance of petitioner's claim (R. 19-21).

The Custodian filed motion for summary judgment with his statement of material facts (R. 21, 22-28). Plaintiff filed its motion for summary judgment (R. 29) with a statement of material facts that in large part adopted and added to the facts stated by the defendant (R. 29-32).

The district court entered its order granting respondent's motion for summary judgment and denying petitioner's (R. 32-33).

On appeal, the court of appeals affirmed (R. 40). Its opinion filed January 4, 1962 (App. A, p. 1a) held that there was no breach of the covenant of the Versailles treaty because Trent Trust, in the proceeding by the German nationals, had been held liable as a trustee for breach of trust. Hence, it concluded, there had been no "claim or action" and no liability imposed in the Hawaiian proceeding in "respect of any act or omission under or in accordance with the exceptional war measures, laws, or regulations of any Allied" power within the meaning of the Versailles treaty annex covenant (App. A, pp. 5a-6a).

By petition for rehearing, plaintiff pointed out that an act or omission might be held to be a breach of duty, as trustee, to a German enemy beneficiary, but at the same time it could be an act or omission recognized by the Versailles treaty to be in full discharge of a higher and more compelling duty to the United States owed to the latter in the exercise of its war powers (R. 41-

45). It also pointed out the plain error: That under T.W.E.A. Trent Trust could not rightly sue to recover from the Custodian either its trustee interest or the beneficiary interest in trust assets held in trust for German enemies; that hence petitioner's omission to sue to recover back was an omission "under and in accordance with" an extraordinary war measure of the United States, viz., the Trading with the Enemy Act (R. 46-50).

By its amending order entered September 14, the Court of Appeals shifted its ground and struck from its opinion the whole paragraph that stated its ground of decision (R. 53). The same order states as the new ground of decision: "It is enough to note that Trent was not held liable by reason of any provision of the Trading with the Enemy Act, or other wartime regulation" (R. 53; App. A, p. 8a).

Accordingly, it entered its order denying petition for rehearing (R. 52).

REASONS FOR GRANTING THE WRIT

The Trent Trust Company was rendered insolvent by the claim and recovery of the German nationals based on its failure as trustee to sue to recover back the trust interests of the German enemy beneficiaries. Through inadvertence of counsel, in that action, the defense was not raised that this omission was also an omission in furtherance of the extraordinary war measures of the United States, in discharge of the higher and superseding duty owed to the United States (*Garvan* v. *Commercial Trust Co. of New Jersey*, 275 Fed. 841, 845 (D. N. J. 1921) aff'd 281 Fed. 804, aff'd 262 U.S. 51) and hence an omission as to which the German government had cove-

nanted that no suit should be brought by German nationals.

A. The failure of the American trustee, as trustee, to sue to recover back was plainly in accord with the Trading with the Enemy Act. It is established that a non-enemy American fiduciary may not recover even its legal interest in a corpus held for enemies. *Farmers Loan & Trust Co.* v. *Hicks*, 9 F. 2d 848 (2d Cir. 1925) cert. den. 269 U.S. 583; *Manufacturers Trust Company* v. *Kennedy*, 291 F. 2d 460, 469 (2d Cir. 1961). In *Cordero* v. *United States*, 111 F. Supp. 556 (S.D.N.Y. 1953) (aff'd 211 F. 2d 90 (2nd Cir. 1954)), it is stated (p. 558)

> "The Government urges with merit that to permit a return of property indirectly to Bulgarian nationals [by return to an American administrator c.t.a.] would not only *frustrate* the purpose of the [Trading with the Enemy] Act but would also nullify the purpose of Article 25 of the Treaty of Peace."

B. Omission to do an act that would have tended to frustrate the purpose of the Trading with the Enemy Act (viz., bringing suit to recover back that could not succeed) was plainly an "omission under or in accordance with" the Trading with the Enemy Act within the letter and spirit of the second sentence of the Versailles Treaty Annex (Paragraph 2 of the Annex to Section IV (which includes Articles 297 and 298) of Part X of the Treaty of Versailles (T. S. No. 658, Sen. Doc. 348, 67th Cong., 4th sess., at p. 3465)):

> "No claim or action shall be made or brought against any Allied or Associated Power or against any person acting on behalf of or under the direction of any legal authortiy or Department of the

Government of such a Power by German or by any German national wherever resident in respect of any act or omission with regard to his property, rights or interests during the war or in preparation for the war. *Similarly no claim or action shall be made or brought against any person in respect of any act or omission under or in accordance with the exceptional war measures, laws or regulations of any Allied or Associated Power.*"

1. *The court below has decided an important question of treaty and municipal law in a manner that deviates from the ordinary course of judicial proceeding.*— The Court below, by its amended opinion holds that the claim of the German nations was not a claim within the scope of the above-italicized covenant not to sue because (App. A, p. 6a),

> "It is enough to note that Trent was not held liable by reason of any provision of the Trading with the Enemy Act or other war-time regulation."

Assuming that the amended opinion is intended to display some adherence to recognized processes of reason, it manifestly posits as the major premise an interpretation of the second sentence of Paragraph 2 of the Annex to make it read:

> "Similarly no claim or action under or in accordance with the exceptional war measures, laws or regulations of any Allied or Associated Power to impose liability under such exceptional war measures shall be brought against any person."

Thus, the covenant against actions against Allied nationals in respect of acts or measures that were in accord with the exceptional war measures is perverted into a covenant against actions for acts that were in violation of, or that otherwise gave rise to liability under, provisions of the extraordinary war measures.

The decision below ignores the related provisions of the Treaty of Versailles, completely ignores all rules of syntax and disregards the plain language of the provision with no showing that such malversion is necessitated by excusing considerations of consistency with other provisions or inherent ambiguity.

The decision has far-reaching importance because the Versailles treaty was adopted by the Treaty of Berlin and the Joint Peace Resolution (*infra*, pp. 14a, 15a) in order that American nationals might for the future be protected not only in this country but in all other countries into which they or their property might come. Certainly, the Courts of third countries in the future cannot be expected to give American nationals greater protection than this decision requires. Nor have we any assurance that statutes of limitations will protect in third countries.

2. *In limiting the protection of the treaty to a covenant against actions to establish liability under the Trading with the Enemy Act, the decision below conflicts in principle with the Second Circuit.*—In *Munich Reinsurance Co.* v. *First Reinsurance Co.*, 6 F. 2d 742, 747-749 (2nd Cir. 1925) aff'g 300 Fed. 345, the Court held the Treaty of Versailles, as adopted by the Joint Peace Resolution and the Treaty of Berlin, to bar assertion of a claim in United States courts tho it did not assert liability under the Trading with the Enemy Act. In *Klein* v. *Palmer*, 18 F. 2d 932 (2d Cir. 1927) the same result was reached.

This Court in *United States* v. *Chemical Foundation*, 272 U.S. 1, in broad and sweeping language that gave full effect to the obvious policy and purpose of the

treaty provisions as well as the received meaning of the language thereof, stated (p. 11):

> "... Moreover, the Treaty of Berlin prevents the enforcement of any claim by Germany or its nationals against the United States or its nationals* on account of the seizures and sales in question. ...
>
> * Part X, Section IV, Article 297, and Annex paragraphs 1 and 3, Treaty of Versailles, adopted by Article II(1), Treaty of Berlin, 42 Stat. 1939, 1943."

3. *The decision rides rough-shod over all principles of treaty and statutory interpretation.*—This Court has repeatedly enforced the rule that a treaty is interpreted according to the natural, fair and received acception of the terms in which it is expressed. (*Ware* v. *Hylton*, 3 Dall. 199, 239-240; *United States* v. *D'Auterive*, 10 How. 609, 623; *Geofroy* v. *Riggs*, 133 U.S. 258, 271; *Santovicenzo* v. *Egan*, 284 U.S. 30, 40) and in the light of the conditions and circumstances existing at the time it is entered into with a view to effecting the objects and purposes of the contracting states (*In re Ross*, 140 U.S. 453, 475; *Rocca* v. *Thompson*, 223 U.S. 317, 331-332). Read in connection with section 297(d) and 297(i) of the Versailles treaty and the provisions of paras. 1 and 3 of the Versailles treaty annex, (App. B, *infra*, pp. 11a-14a) it cannot be reasonably argued that the second paragraph of the Annex permits of the restricted and nugatory interpretation of the court below.

4. *A grave question of public policy is involved.*—We need not dwell on the importance of opinions of courts in obtaining continuing public respect for their decisions. Here, the President and the Senate by incorporating in the Treaty of Berlin the provisions that

the other Allied countries had required in the Treaty of Versailles manifested due regard for the importance to this country of continuing assurance to its citizens. When in time of war or national emergency they are called upon to subordinate their contract, debt, trustee, partner, agent or other duties to nationals of other countries to that higher and supervening duty to the United States, they must be assured that they will not thereafter be subjected to liability for any acts or omissions that discharge or are in accordance with that higher duty.

This is vital public policy. An unreasoned opinion that does such violence to the expressed public policy in such unreasoned fashion requires review by this Court.

CONCLUSION

It is respectfully submitted that writ of certiorari should issue to review the decision of the Court of Appeals for the District of Columbia Circuit.

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December, 1962

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,460

TRENT TRUST COMPANY, LTD., ET AL., *Appellants*,

v.

ROBERT F. KENNEDY, Attorney General of the United States, as Successor to the Alien Property Custodian, *Appellee*.

Appeal from the United States District Court for the District of Columbia

Decided January 4, 1962

Mr. Willian D. Donnellly for appellants.

Mr. Armand B. DuBois, Attorney, Department of Justice, with whom *Assistant Attorney General William H. Orrick, Jr.*, was on the brief, for appellee. *Mr. Morton Hollander*, Attorney, Department of Justice, also entered an appearance for appellee.

Before WASHINGTON, DANAHER and BURGER, *Circuit Judges*.

WASHINGTON, *Circuit Judge:* This is an alien property case. The Trent Trust Company of Honolulu, Hawaii, was held liable in 1928 to pay damages to certain German nationals for breach of trust in failing to bring suit under Section 9 of the Trading with the Enemy Act[1] to recover

[1] 50 U.S.C. App. § 9.

property which had been taken and sold by the Alien Property Custodian during World War I. The property was part of a trust under which the German nationals were beneficiaries. *Isenberg* v. *Trent Trust Co.*, 26 F.2d 609 (9th Cir. 1928), rehearing denied, 31 F.2d 553 (9th Cir.), cert. denied, 279 U.S. 862 (1929).

The present suit was brought in the United States District Court for the District of Columbia in 1959. Trent Trust Company sought review of an order of the Attorney General entered in 1956, in which the latter disallowed a claim by Trent against funds of the German Government seized and held by him. Trent's claim was made under Section 34 of the Trading with the Enemy Act,[2] on the theory that Trent was a creditor of the German Government, i.e., that the latter was obligated to make Trent whole as to the damages paid by it to the trust beneficiaries. The amended complaint in the District Court says, *inter alia*, that—

> "Under section 2 of the Joint Resolution Terminating the State of War, July 2, 1921, 42 STAT. 105, which section is recited in the Treaty of Berlin of August 25, 1921, proclaimed November 14, 1921, 42 STAT. 1939, and particularly under Articles I and II(1) of said Treaty which adopted by reference certain provisions of the Treaty of Versaille[s] (Treaty Series No. 658, Sen. Doc. 348, 67th Cong., 1st Sess.) Part X, Section IV, Article 297(d) and paragraphs 1, 2 and 3 of Annex to Section IV, the German Government itself in effect issued a valid insurance policy to any American national that he would not be held liable by a German national for any act or omission in compliance or in accordance with exceptional war

[2] 50 U.S.C. App. § 34. Cooke Trust Company was appointed receiver of Trent Trust Company in 1932, and appears in this case in that capacity as a plaintiff-appellant.

measures which had as an object the seizure, or use of, or interference with enemy assets."[3]

In March, 1961, the District Court granted the Government's motion for summary judgment. This appeal followed.

We need not spell out the learned arguments made by appellants and appellee for and against the claim that the Treaty of Versailles and the Treaty of Berlin created an obligation on the part of the German Government to indemnify American nationals for damages suffered by the latter as a result of suits brought by German nationals under circumstances similar to those presented in the 1928 litigation. We do not reach that issue here. Trent's position has as its inevitable corollary that the Ninth Circuit's decision in the *Isenberg* case was erroneous, in that no liability should have been attached by an American court in such a suit by German nationals. But Trent made no such claim in the 1928 litigation until after the Ninth Circuit had rendered its decision. Then, in a petition for certiorari to the Supreme Court, Trent claimed that the Ninth Circuit had erred (among other things) in disregarding Article 297 of the Treaty of Versailles.

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[3] Principal reliance is placed by appellant on Part 2 of the Annex to Article 297 of the Treaty of Versailles, Section IV (Treaty Series No. 658, Sen. Doc. 348, 67th Cong., 4th Sess., at p. 3465), reading as follows:

> "No claim or action shall be made or brought against any Allied or Associated Power or against any person acting on behalf of or under direction of any legal authority or Department of the Government of such a Power by Germany or by any German national wherever resident is respect of any act or omission with regard to his property, rights or interests during the war or in preparation for the war. *Similarly no claim or action shall be made or brought against any person in respect of any act or omission under or in accordance with the exceptional war measures, laws, or regulations of any Allied or Associated Power.*" (Emphasis supplied.)

(No. 811, October Term, 1928) Certiorari was denied. Such denial, of course, is not to be taken as passing on the merits of any of the contentions advanced in the petition for certiorari. Thus, to determine the basis on which Trent was held liable to the trust beneficiaries, we must go to the opinions of the Ninth Circuit, originally and upon rehearing. The Ninth Circuit, on rehearing, said:

> "Speaking generally, the ground or basis of the decision adverse to the appellee was that it was its plain duty, upon its appointment as trustee of the Isenberg trusts, to institute proceedings under the Trading with the Enemy Act (50 USCA appendix) for the recovery of the shares of stock here involved, and that its failure so to do resulted in the sale of the stock by the Alien Property Custodian, and its consequent loss to the cestuis que trust. As bearing upon the question of damages, it is now contended that this court did not find that the conduct of the appellee was fraudulent. It will be conceded that its conduct was not so characterized in the former opinion, nor need it be so characterized at this time; but it was found that, in assuming to act as agent or depository for the Alien Property Custodian and as trustee for the alien enemies, the appellee acted in inconsistent and conflicting capacities; that it was and had been the policy of the Alien Property Custodian not to seize or sell the corpus of the estates of alien enemies held in trust by American trustees; that this policy was well known to the appellee; that the appellee did not apply to the appointing court for instructions as to its duty, nor did it seek advice from an independent source. Whether such a course of conduct on the part of a trustee was fraudulent or not, it constituted a plain breach of trust, and the rights and obligations of the parties must be measured accordingly. The controlling facts were that the trustee had willfully and negligently failed to reduce

the trust property to possession, and had suffered it to be sold by another, to the detriment of the beneficiaries. Under these facts the trial court held that the beneficiaries were entitled to a restoration of the trust property in kind at the termination of the trust, or to its value as of that date, in case restoration could not be had, together with all accrued dividends and interest." 31 F.2d 553 at 554-55.

[The following material in brackets was included in the original opinion filed January 4, 1962, but stricken in the amending order of September 14, 1962 (R. 53):

"[The ground of decision was thus based on the conduct of Trent as a trustee, in failing to produce the beneficiaries of the trust, rather than on the fact that for a time it acted as a Depository for the Alien Property Custodian in Hawaii.[4] No action or omission of Trent in the latter capacity formed the basis of the Ninth Circuit's decision; rather, it was Trent's actions and omissions as a trustee. There was thus no "claim or action," and no resulting liability, against an American *defendant "in respect of any act or omission under* or in accordance with the exceptional war measures, laws, or regulations of any Allied or Associated Power," within the meaning of Part 2 of the Annex to Article 297 of the Treaty of Versailles.[5] Whether or not the Ninth Circuit properly imposed liability on Trent is not and cannot be in issue here. The liability it did impose, by reason of Trent's conduct as a trustee, cannot be said to be based on Trent's conduct "under or in accordance with" the exceptional war measures of the United States, since clearly Trent could have brought suit under Section 9(a) in an effort to recover the seized property. The pendency of such a suit would under the very terms of that section have operated to prevent the sale of the property. Nothing in the "ex-

[4] Though that fact—as the Ninth Circuit states—did create a flagrant conflict of interest.

[5] Quoted *supra* note 3.

ceptional war measures" of the United States prevented the bringing of such a suit: quite the contrary was true.]]

The decision was thus based on the conduct of Trent as a trustee, applying ordinary principles of law and equity. Whether or not the Ninth Circuit properly imposed liability on Trent is not and cannot be in issue here. It is enough to note that Trent was not held liable by reason of any provision of the Trading with the Enemy Act, or other wartime regulation. Under the circumstances of the case, we must conclude that there was no "claim or action," and no resulting liability, against an American defendant "in respect of any act or omission under or in accordance with the exceptional war measures, laws, or regulations of any Allied or Associated Power," within the meaning of Part 2 of the Annex to Article 297 of the Treaty of Versailles.[4]

For these reasons, without reaching the other contentions of the parties, the judgment of the District Court will be

Affirmed.

(Filed January 4, 1962)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1961

Civil 3643-59

No. 16,460

TRENT TRUST COMPANY, LTD., ET AL., *Appellants*,

v.

ROBERT F. KENNEDY, Attorney General of the United States, as Successor to the Alien Property Custodian, *Appellee*.

Appeal from the United States District Court for the District of Columbia.

Before: WASHINGTON, DANAHER and BURGER, *Circuit Judges*.

Judgment

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

ON CONSIDERATION WHEREOF It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause be, and it is hereby, affirmed.

Per Circuit Judge Washington

Dated: January 4, 1962.

(Filed September 14, 1962)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1962

No. 16,460

TRENT TRUST COMPANY, LTD., ET AL., *Appellants*,

v.

ROBERT F. KENNEDY, Attorney General of the United States, as Successor to the Alien Property Custodian, *Appellee*.

Order

Before: WASHINGTON, DANAHER and BURGER, *Circuit Judges*.

It is ORDERED by the court that the opinion filed January 4, 1962, in the above case is amended as follows:

(1) Delete the next to the last paragraph of the opinion commencing on page 5 and ending on page 6, and delete footnotes 4 and 5 on page 5.

(2) In lieu of the above deleted material, insert the following paragraph and footnote 4:

> The decision was thus based on the conduct of Trent as a trustee, applying ordinary principles of law and equity. Whether or not the Ninth Circuit properly imposed liability on Trent is not and cannot be in issue here. It is enough to note that Trent was not held liable by reason of any provision of the Trading with the Enemy Act, or other wartime regulation. Under the circumstances of the case, we must conclude that there was no "claim or action," and no resulting liability, against an American defendant "in respect

of any act or omission under or in accordance with the exceptional war measures, laws, or regulations of any Allied or Associated Power," within the meaning of Part 2 of the Annex to Article 297 of the Treaty of Versailles.

[4] Quoted *supra*, note 3.

Per Curiam

Dated: September 14, 1962

APPENDIX B

Treaties and Statute Involved

The Trading with the Enemy Act, Sec. 34 (added by the Act of August 8, 1946, c. 878, sec. 1, 60 Stat. 925, 927 (1946), amending the First War Powers Act, 1941, Title III, 55 Stat. 838 (1941), 50 U.S.C. App. § 34) provides:

> "Sec. 34. (a) Any property or interest vested in or transferred to the Alien Property Custodian (other than any property or interest acquired by the United States prior to December 18, 1941), or the net proceeds thereof, shall be equitably applied by the Custodian in accordance with the provisions of this section to the payment of debts owed by the person who owned such property or interest immediately prior to its vesting in or transfer to the Alien Property Custodian . . . Any defense to the payment of such claims which would have been available to the debtor shall be available to the Custodian, . . .
>
> • • • • •
>
> "(f) If the aggregate of debt claims filed as prescribed exceeds the m[illegible]ey from which, in accordance with subsection (d) hereof, payment may be made, the Custodian shall prepare and serve by registered mail

[4] Quoted *supra*, note 3.

on all claimants a schedule of all debt claims allowed and the proposed payment to each claimant. In preparing such schedule, the Custodian shall assign priorities in accordance with the provisions of subsection (g) hereof. Within sixty days after the date of mailing of such schedule, any claimant considering himself aggrieved may file in the District Court of the United States for the District of Columbia a complaint for review of such schedule, naming the Custodian as defendant. A copy of such complaint shall be served upon the Custodian and on each claimant named in the schedule. The Custodian, within forty-five days after service on him, shall certify and file in said court a transcript of the record of proceedings in the Office of Alien Property Custodian with respect to such schedule. Upon good cause shown such time may be extended by the court. Such record shall include the claims in question as filed, such evidence with respect thereto as may have been presented to the Custodian or introduced into the record by him, any findings or other determinations made by the Custodian with respect thereto, and the schedule prepared by the Custodian. The court may, in its discretion, take additional evidence, upon a showing that such evidence was offered to and excluded by the Custodian or could not reasonably have been adduced before him or was not available to him. Any interested debt claimant who has filed a claim with the Custodian pursuant to this section, upon timely application to the court, shall be permitted to intervene in such review proceedings. The court shall enter judgment affirming or modifying the schedule as prepared by the Custodian and directing payment, if any be found due, pursuant to the schedule as affirmed or modified and to the extent of the money from which, in accordance with subsection (d) hereof, payment may be made. Pending the decision of the court on such complaint for review, and pending final determination

of any appeal from such decision, payment may be made only to an extent, if any, consistent with the contentions of all claimants for review."

The Treaty of Versailles, concluded June 28, 1919 (Treaty Series No. 658, Sen. Doc. 348, 67th Cong., 4th Sess.) provides:

"Part X

"ECONOMIC CLAUSES

* * * * *

"Section IV

"PROPERTY, RIGHTS AND INTERESTS

"ARTICLE 297

"The question of private property, rights and interests in an enemy country shall be settled according to the principles laid down in this Section and to the provisions of the Annex hereto.

* * * * * *

"(d) As between the Allied and Associated Powers or their nationals on the one hand and Germany or her nationals on the other hand, all the exceptional war measures, or measures of transfer, or acts done or to be done in execution of such measures as defined in paragraphs 1 and 3 of the Annex hereto shall be considered as final and binding upon all persons except as regards the reservations laid down in the present Treaty.

* * * * *

"(i) Germany undertakes to compensate her nationals in respect of the sale or retention of their property, rights or interests in Allied or Associated States.

* * * * *

"ANNEX

[to Section IV]

"1.

"In accordance with the provisions of Article 297, paragraph (d), the validity of vesting orders and of orders for the winding up of businesses or companies, and of any other orders, directions, decisions or instructions of any court or any department of the Government of any of the High Contracting Parties made or given, or purporting to be made or given, in pursuance of war legislation with regard to enemy property, rights and interests is confirmed. The interests of all persons shall be regarded as having been effectively dealt with by any order, direction, decision or instruction dealing with property in which they may be interested, whether or not such interests are specifically mentioned in the order, direction, decision, or instruction. No question shall be raised as to the regularity of a transfer of any property, rights or interests dealt with in pursuance of any such order, direction, decision or instruction. Every action taken with regard to any property, business, or company, whether as regards its investigation, sequestration, compulsory administration, use, requisition, supervision, or winding up, the sale or management of property, rights or interests, the collection or discharge of debts, the payment of costs, charges or expenses, or any other matter whatsoever, in pursuance of orders, directions, decisions, or instructions of any court or of any department of the Government of any of the High Contracting Parties, made or given, or purporting to be made or given, in pursuance of war legislation with regard to enemy property, rights or interests, is confirmed. Provided that the provisions of this paragraph shall not be held to prejudice the titles to property heretofore acquired in good faith and for value and in accordance with the laws of

the country in which the property is situated by nationals of the Allied and Associated Powers.

"The provisions of this paragraph do not apply to such of the above-mentioned measures as have been taken by the German authorities in invaded or occupied territory, nor to such of the above mentioned measures as have been taken by Germany or the German authorities since November 11, 1918, all of which shall be void.

"2.

"No claim or action shall be made or brought against any Allied or Associated Power or against any person acting on behalf of or under the direction of any legal authority or Department of the Government of such a Power by Germany or by any German national wherever resident in respect of any act or omission with regard to his property, rights or interests during the war or in preparation for the war. Similarly no claim or action shall be made or brought against any person in respect of any act or omission under or in accordance with the exceptional war measures, laws or regulations of any Allied or Associated Power.

"3.

"In Article 297 and this Annex the expression 'exceptional war measures' includes measures of all kinds, legislative, administrative, judicial or others, that have been taken or will be taken hereafter with regard to enemy property, and which have had or will have the effect of removing from the proprietors the power of disposition over their property, though without affecting the ownership, such as measures of supervision, of compulsory administration, and of sequestration; or measures which have had or will have as an object the seizure of, the use of, or the interference with enemy assets, for whatsoever motive, under whatsoever form

or in whatsoever place. Acts in the execution of these measures include all detentions, instructions, orders or decrees of Government departments or courts applying these measures to enemy property, as well as acts performed by any person connected with the administration or the supervision of enemy property, such as the payment of debts, the collecting of credits, the payment of any costs, charges or expenses, or the collecting of fees.

"Measures of transfer are those which have affected or will affect the ownership of enemy property by transferring it in whole or in part to a person other than the enemy owner, and without his consent, such as measures directing the sale, liquidation, or devolution of ownership in enemy property, or the cancelling of titles or securities."

The Joint Peace Resolution of July 2, 1921, S. J. Res. 16, c. 40, 42 Stat. 105, in pertinent part provides:

"That the state of war declared to exist between the Imperial German Government and the United States of America by the joint resolution of Congress approved April 6, 1917, is hereby declared at an end.

"Sec. 2. That in making this declaration, and as a part of it, there are expressly reserved to the United States of America *and its nationals any and all rights, privileges, indemnities*, reparations, or advantages, *together with the right to enforce the same*, to which *it or they* have become entitled under the terms of the armistice signed November 11, 1918, or any extensions or modifications thereof; or which were acquired by or are in the possession of the United States of America by reason of its participation in the war or to which its nationals have thereby become rightfully entitled; *or which, under the treaty of Versailles*, have been stipulated for *its or their benefit;* or to which it is

entitled as one of the principal allied and associated powers; or to which it is entitled by virtue of any Act or Acts of Congress; or otherwise." (Emphasis supplied).

• • • • •

The Treaty of Berlin, proclaimed November 14, 1921, 42 Stat. 1939, recites verbatim section 2 of the Joint Resolution, *supra*, and provides (42 Stat. 1942-1943):

"ARTICLE I.

"Germany undertakes to accord to the United States, and the United States shall have and enjoy, all the rights, privileges, indemnities, reparations or advantages specified in the aforesaid Joint Resolution of the Congress of the United States of July 2, 1921, including all the rights and advantages stipulated for the benefit of the United States in the Treaty of Versailles which the United States shall fully enjoy notwithstanding the fact that such Treaty has not been ratified by the United States.

"ARTICLE II.

"With a view to defining more particularly the obligations of Germany under the foregoing Article with respect to certain provisions in the Treaty of Versailles, it is understood and agreed between the High Contracting Parties:

"(1) That the right and advantages stipulated in that Treaty for the benefit of the United States, which it is intended the United States shall have and enjoy, are those defined in Section 1, of Part IV, and Parts V, VI, VIII, IX, X, XI, XII, XIV, and XV.

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No. 662

In the Supreme Court of the United States

OCTOBER TERM, 1962

TRINITY TRUST COMPANY, LTD.

and

OCEAN TRUST COMPANY, LTD., PETITIONERS

v.

ROBERT [illegible], ATTORNEY GENERAL OF THE UNITED STATES, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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Solicitor General,
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Assistant Attorney General,
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[illegible],
Attorneys,
Department of Justice, Washington, D.C.

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 662

TRENT TRUST COMPANY, LTD.

and

COOK TRUST COMPANY, LTD., PETITIONERS

v.

ROBERT F. KENNEDY, ATTORNEY GENERAL OF THE UNITED STATES, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

In 1928, petitioner Trent Trust Company as trustee for German beneficiaries was held liable for breach of trust in failing to bring suit under Section 9 of the Trading With the Enemy Act, 50 U.S.C. App. 9, to obtain recovery—and thus prevent the sale at an unreasonably low price—of property which had been taken by the Alien Property Custodian during World War I. Trent was required to pay damages to the beneficiaries, *Isenberg* v. *Trent Trust Co.*, 26 F. 2d 609 (C.A. 9), rehearing denied, 31 F. 2d 553 (C.A. 9).

certiorari denied, 279 U.S. 862.[1] The present suit was brought in the district court in 1959 to review the disallowance by the Attorney General[2] of petitioner's debt claim, under Section 34(f) of the Trading With the Enemy Act, as amended, 50 U.S.C. App. 34(f), against funds of the German government held by the Custodian.

As basis for this claim, petitioners rely on paragraph 2 of the Annex to Article 297 of the Treaty of Versailles (applicable between Germany and the United States by incorporation into the Treaty of Berlin), which provides in pertinent part that:

> * * * [N]o claim or action shall be made or brought against any person in respect of any act or omission under or in accordance with the exceptional war measures, laws or regulations of any Allied or Associated Power.

They maintain that Trent's failure to institute Section 9 proceedings to recover back the property was an "omission under or in accordance with" the Trading With the Enemy Act within the meaning of

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[1] Trent's petition for certiorari in the 1928 litigation alleged that the Ninth Circuit had ignored the identical treaty provision upon which its current petition is based. See No. 811, Oct. Term, 1928: Brief in Support of Petition for Certiorari, pp. 2, 9, 27–28; and Petition for Rehearing of Order Denying Petition for Writ of Certiorari, pp. 17–18. This Court denied certiorari. 279 U.S. 862.

[2] By Executive Order No. 9788 (11 F.R. 11981, Oct. 14, 1946), the Office of the Alien Property Custodian was terminated and its powers and functions transferred to the Attorney General. The term "Custodian" will be used to refer to the Alien Property Custodian or the Attorney General as his successor as the context may require.

the above treaty provision, which provision, moreover, they construe as an undertaking by the German government to indemnify any American national who suffered loss as a result of suit by German nationals.[3]

1. Paragraph 2 of the Annex to Article 297 of the Treaty of Versailles has been consistently construed by the courts merely as barring the enforcement of—*i.e.*, providing a defense to—claims by Germany or its nationals against the United States or its nationals on account of actions under color of the Trading With the Enemy Act and other exceptional war measures. *United States* v. *Chemical Foundation*, 272 U.S. 1, 11; *Klein* v. *Palmer*, 18 F. 2d 932, 933 (C.A. 2); *Jenny and Hedwig R.* v. *Belgian State*, *Annual Digest of Public International Law Cases* 1938–1940, Case No. 123, p. 377. There is no authority to support the view that the paragraph obligates Germany to indemnify Americans who suffered losses as a result of actions by German nationals over which Germany might have no control.

2. Moreover, there is no merit to the contention that the omission for which Trent was surcharged—*i.e.*, its failure to institute Section 9 proceedings—was "under or in accordance with" the Trading With the

[3] Ten months prior to its appointment as trustee, Trent was appointed depositary for the Alien Property Custodian under Section 12 of the Trading With the Enemy Act, 50 U.S.C. App. 12. In the original trust litigation, Trent maintained that its failure to recover possession of the trust shares was justified by its powers and duties as depositary for the Custodian. *Estate of Isenberg*, 28 Haw. 590 (1925). This argument was rejected by the Ninth Circuit and is not raised in the present petition.

Enemy Act. The basis for Trent's liability was clearly stated in the opinion on rehearing by the Court of Appeals for the Ninth Circuit (*Isenberg* v. *Trent Trust Co.*, 31 F. 2d 553, 554–555):

> Speaking generally, the ground or basis of the decision adverse to the appellee was that it was its plain duty, upon its appointment as trustee of the Isenberg trusts, to institute proceedings under the Trading With the Enemy Act for the recovery of the shares of stock here involved, and that its failure so to do resulted in the sale of the stock by the Alien Property Custodian, and its consequent loss to the *cestuis que* trust * * *. The controlling facts were that the trustee had wilfully and negligently failed to reduce the trust property to possession, and had suffered it to be sold by another, to the detriment of the beneficiaries. * * *

It is plain that the breach of trust for which Trent was held liable consisted not in having *complied* with the Act, but rather in having neglected to take advantage of a procedure which the Act made available. Petitioners urge (Pet. 8–9) that it would have been futile for Trent to bring a Section 9 suit to recover the property, since it is established that a non-enemy American fiduciary may not recover even its legal interest in a corpus held for enemies. *Farmers' Loan & Trust Co.* v. *Hicks*, 9 F. 2d 848 (C.A. 2, 1925); *Manufacturers Trust Co.* v. *Kennedy*, 291 F. 2d 460, 469 (C.A. 2, 1961). However, as of January 1919, when the sale of the trust shares by the Custodian took place, it was by no means clear that an action by an American trustee for German beneficiaries

would have been unavailing, as the *Hicks* case, *supra*, had not yet been decided. And, since Section 9 expressly requires the Custodian to retain the property in his custody *pendente lite*, the mere bringing of the suit would have prevented the sale at the depressed prices prevailing on the January 1919 date. In any event, the Ninth Circuit, in upholding the imposition of a surcharge, impliedly concluded that Trent might have been successful in recovering the trust shares had it made the attempt.[4] This holding, we think, is binding on petitioners here. See *Bruszewski* v. *United States*, 181 F. 2d 419, 422 (C.A. 3); *United Banana Co.* v. *United Fruit Co.*, 172 F. Supp. 580, 588 (D. Conn.); *Bernhard* v. *Bank of America Nat'l Trust & Savings Ass'n*, 19 Cal. 2d 807, 122 P. 2d 892, 895.

3. Petitioner's complaint, in effect, is that the Ninth Circuit in 1928 erred in surcharging Trent for its failure to prevent the sale of the trust shares at an unreasonably low price. They admit, however (Pet. 8), that "through inadvertence of counsel" the possible defense of the Treaty of Versailles was not raised in the trust litigation, nor indeed, apparently, until the briefing of the question in this Court in 1929.[5] Obviously, errors of counsel in the trust litigation may not be corrected in a collateral proceeding

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[4] The Ninth Circuit decided that the trust shares had not been effectively seized by Trent in its capacity as depositary of the Custodian, see fn. 3, *supra*, and therefore (by implication) that Trent, as trustee, might have obtained return of the shares by filing a Section 9 suit. *Isenberg* v. *Trent Trust Co.*, *supra*, 26 F. 2d at 612–613.

[5] See fn. 1, *supra*, p. 2.

more than thirty years later. As the court below correctly pointed out, "[w]hether or not the Ninth Circuit properly imposed liability on Trent is not and cannot be in issue here." 307 F. 2d at 176.

The decision below is plainly correct. There is no conflict of decisions, and the circumstances of the case are unique, presenting no question of general public importance. The petition for certiorari should be denied.

Respectfully submitted.

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JANUARY 1963.